

CONSTITUTIONAL LAW REPORTER

Arizona Constitution

©2011 by Crane McClennen

Ariz. Const. art. 2, sec. 2.1(A)(3). Victim's rights — Right to be present.

az.2.2.1.a.3.010 The Arizona Constitution gives victims the right to be present at all criminal proceedings, and the rules of criminal procedure do not trump those rights.

Morehart v. Barton, 225 Ariz. 269, 236 P.3d 1216, ¶¶ 6–7 (Ct. App. 2010) (trial court granted defendant's request for *ex parte* hearing to address defendant's mitigation matters; defendant contended Rule 15.9(b), which allows for *ex parte* proceeding upon proper showing of need for confidentiality, justified trial court's order; court held Victim's Bill of Rights gave victim's family members right to be present at all proceedings, and that Rule 15.9(b) did not trump that right).

Ariz. Const. art. 2, sec. 2.1(C). Victim's rights—Definition of "victim."

az.2.2.1.c.040 A person who is a victim and is later charged with an unrelated offense and taken into custody retains the status as "victim" under Victim's Bill of Rights.

State v. Nichols (Ergonis), 224 Ariz. 569, 233 P.3d 1148, ¶¶ 7–22 (Ct. App. 2010) (defendant was charged with kidnapping, robbing, and assaulting J.C., who then moved to Massachusetts, where he was charged with unrelated weapons offense and incarcerated for 5 months; court held J.C. did not lose status as "victim" under Victim's Bill of Rights).

Ariz. Const. art. 2, sec. 8. Right to privacy.

az.2.8.020 Except for cases involving homes, Arizona courts have not yet held Article 2, section 8, grants broader protections against search and seizure than those available under the federal constitution.

State v. Huerta, 223 Ariz. 424, 224 P.3d 240, ¶ 18 (Ct. App. 2010) (after persons in SUV fired shots at defendant, defendant got into his truck and chased after them, spilling items from bed of truck onto roadway; sheriff's deputies arrived and moved items onto sidewalk; when defendant returned, he claimed all items except for duffle bag; when specifically asked about duffle bag, defendant neither admitted nor denied owning it; deputies opened duffle bag and found cocaine in it; from totality of circumstances, court concluded defendant abandoned duffle bag and thereby sacrificed any privacy interest he had in it, so search of bag did not violate any federal constitutional right defendant had; defendant contended he was entitled to greater protection under Arizona Constitution; court declined defendant's invitation to analyze issue separately under Arizona Constitution, and thus trial court erred in granting defendant's motion to suppress).

az.2.8.030 Even if there is a violation of the knock and announce rule, the Arizona Constitution does not require suppression of the evidence seized.

State v. Roberson, 223 Ariz. 580, 225 P.3d 1156, ¶¶ 8–16 (Ct. App. 2010) (officers had search warrant that said nothing about unannounced entry; officer found defendant's front door closed but unlocked; believing he had "no knock" warrant, officer opened door and went into home, where he seized drugs and drug paraphernalia; defendant conceded that, under United States Constitution, knock and announce violation does not require suppression of evidence seized; court noted that Arizona cases have provided greater protection under Arizona Constitution only for warrantless searches and that federal interpretation of knock

and announce rule was consistent with interpretation of Arizona Constitution, thus trial court properly denied motion to suppress).

az.2.8.170 If the police have engaged in illegal conduct and the defendant subsequently consents to a search, the court must look at three factors to determine whether the taint of the illegal conduct is sufficiently attenuated from the evidence subsequently obtained: (1) the time elapsed between the illegal conduct and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

State v. Guillen, 223 Ariz. 314, 223 P.3d 658, ¶¶ 13–23 (2010) (officers received information that defendant was storing marijuana in his garage; when defendant and his wife were not home, officers brought narcotics dog to sniff outside of garage, whereupon dog alerted on garage; when defendant's wife returned, officers asked if they could search premises, and she consented; after narcotics dog alerted on freezer, officers obtained search warrant and discovered bales of marijuana in two other freezers; court began by assuming, without deciding, that dog sniff violated Article 2, Section 8; court then held intervening circumstances obviated any alleged taint, specifically because wife was unaware of dog sniff when she consented, and that first dog sniff conducted from outside garage was not flagrant police conduct, thus trial court did not err in denying motion to suppress marijuana).

Ariz. Const. art. 2, sec. 23. Trial by jury—Number of jurors.

az.2.23.nj.010 If the possible punishment is death or 30 years or more, the defendant is entitled to a 12-person jury; in all other cases, the defendant is entitled to not less than an 8-person jury pursuant to A.R.S. § 21–102(B).

State v. Diaz, 223 Ariz. 358, 224 P.3d 174, ¶¶ 11–17 (2010) (trial court impaneled 15 jurors; at close of case, trial court excused three jurors and told jurors that “[a]ll 12 of you must agree on a verdict”; at point when jurors reconvened next day, record was silent on whether all 12 jurors were present; when jurors returned their verdict, trial court noted “the presence of the jury” and *sua sponte* polled jurors; transcript, however, only contained names of 11 jurors; after court of appeals issued its opinion reversing conviction, court reporter submitted revised showing all 12 jurors were polled; court held that even uncorrected record taken as a whole failed to show that only 11 jurors participated, thus no error).

Ariz. Const. art. 2, sec. 24. Rights of an accused—Appeal.

az.2.24.ap.060 A.R.S. § 13–4033(C) precludes a defendant from appealing if the defendant voluntarily absents himself or herself and that prevents the sentencing from occurring within 90 days after conviction.

State v. Soto, 225 Ariz. 532, 241 P.3d 896, ¶ 5 (2010) (because state conceded statute did not apply to defendant, court declined to rule on any constitutional or retroactivity issues).

Ariz. Const. art. 2, sec. 25. Ex post facto laws.

az.2.25.010 The federal and Arizona *ex post facto* clauses do not differ significantly, and Arizona courts have consistently employed a common analysis for both provisions.

State v. Henry, 224 Ariz. 164, 228 P.3d 900, ¶ 26 (Ct. App. 2010) (court follows *Smith v. Doe*, 538 U.S. 84 (2003) and *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992), and holds registration requirement for sex offenders is regulatory in nature and thus does not violate prohibition against *ex post facto* laws).

Ariz. Const. art. 2, sec. 30. Indictment of information; preliminary examination.

az.2.30.010 A person may not be prosecuted in any court of record for a felony or misdemeanor without an information or indictment; this is, however, only a personal right to the defendant and is not a requirement for the trial court to obtain jurisdiction.

State v. Maldonado, 223 Ariz. 309, 223 P.3d 653, ¶¶ 7–26 (2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded that Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

Article 3. Separation of powers — Arizona Court of Appeals may not usurp the Arizona Supreme Court.

az.3.cc.020 A lower appellate court is bound to follow holding of higher appellate court.

State v. Henry, 224 Ariz. 164, 228 P.3d 900, ¶¶ 7–26 (Ct. App. 2010) (court follows *Smith v. Doe*, 538 U.S. 84 (2003) and *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217 (1992), and holds registration requirement for sex offenders is regulatory in nature and thus does not violate prohibition against *ex post facto* laws).

Article 3. Separation of powers — Executive may not usurp the courts.

az.3.ec.010 To determine whether a statute contravenes the constitutional mandate of separation of powers, the court must consider **four** factors, the **first** of which is the essential nature of the power being exercised.

Gelb v. Department of Fire, Bldg. & Life Safety, 225 Ariz. 515, 241 P.3d 512, ¶ 12 (Ct. App. 2010) (Arizona Legislature established administrative hearing process for resolution of disputes between homeowners and homeowners' associations in planned communities whereby party may file with DFBLS petition for hearing, and then DFBLS director may refer petition to office of administrative hearings; after hearing, ALJ will render decision that is final, and sole relief from ALJ decision is review by superior court under administrative review process; parties did not dispute that this power is judicial in nature).

az.3.ec.020 To determine whether a statute contravenes the constitutional mandate of separation of powers, the court must consider **four** factors, the **second** of which is the degree of control the executive branch assumes in the exercise of the power.

Gelb v. Department of Fire, Bldg. & Life Safety, 225 Ariz. 515, 241 P.3d 512, ¶ 13 (Ct. App. 2010) (Arizona Legislature established administrative hearing process for resolution of disputes between homeowners and homeowners' associations in planned communities whereby party may file with DFBLS petition for hearing, and then DFBLS director may refer petition to office of administrative hearings; after hearing, ALJ will render decision that is final, and sole relief from ALJ decision is review by superior court under administrative review process; court held administrative process did not exert coercive influence over judiciary because judiciary had ultimate power of review).

az.3.ec.030 To determine whether a statute contravenes the constitutional mandate of separation of powers, the court must consider **four** factors, the **third** of which is the objective of the exercise of the power and whether the agency cooperates with the judiciary by furnishing some special expertise.

Gelb v. Department of Fire, Bldg. & Life Safety, 225 Ariz. 515, 241 P.3d 512, ¶¶ 15–19 (Ct. App. 2010) (Arizona Legislature established administrative hearing process for resolution of disputes between homeowners and homeowners' associations in planned communities whereby party may file with DFBLS petition for hearing, and then DFBLS director may refer petition to office of administrative hearings; after hearing, ALJ will render decision that is final, and sole relief from ALJ decision is review by superior court under administrative review process; court held administrative process failed this part of test because DFBLS had no special expertise in resolving disputes between homeowners and homeowners' associations).

az.3.ec.040 To determine whether a statute contravenes the constitutional mandate of separation of powers, the court must consider **four** factors, the **fourth** of which is the practical consequence of the action.

Gelb v. Department of Fire, Bldg. & Life Safety, 225 Ariz. 515, 241 P.3d 512, ¶¶ 20–21 (Ct. App. 2010) (Arizona Legislature established administrative hearing process for resolution of disputes between homeowners and homeowners' associations in planned communities whereby party may file with DFBLS petition for hearing, and then DFBLS director may refer petition to office of administrative hearings; after hearing, ALJ will render decision that is final, and sole relief from ALJ decision is review by superior court under administrative review process; court held administrative process failed this part of test because DFBLS had no special expertise in resolving disputes between homeowners and homeowners' associations and therefore administrative process threatened core functions of courts).

Article 3. Separation of powers — Legislature may not usurp the courts.

az.3.lc.055 The legislature may change a statute, and the separation of powers doctrine does not preclude the legislature from overruling or changing a judicial interpretation of a statute and apply it on a retroactive basis.

State v. Montes, ___ Ariz. ___, 245 P.3d 879, ¶¶ 8–19 (2011) (defendant committed his offenses September 11, 2005; because defendant committed his offenses prior to April 24, 2006, and his trial began after that date, trial court required defendant to prove that he acted in self-defense; defendant was convicted and appealed; court affirmed conviction on September 18, 2009, and defendant filed motion for reconsideration, which was pending on September 30, 2009, effective date of Senate Bill 1449; defendant contended Senate Bill 1449 was change in law that entitled him to new trial; court held Senate Bill 1449 was not unconstitutional and thus entitled defendant to new trial).

State v. Rios, 225 Ariz. 292, 237 P.3d 1052, ¶¶ 1–51 (Ct. App. 2010) (state charged defendant in November 2005 with first degree murder, aggravated assault, discharge of firearm at structure, and assisting criminal street gang; evidence showed victim pulled their truck in front of defendant's house and had verbal altercation with defendant's friends and relatives; defendant stated he heard them threaten his brother, so he retrieved and loaded his AK-47 and fired several rounds at truck, killing one and injuring other; defendant testified he fired

at victims only because he feared they would use deadly force against him and his family; defendant requested trial court instruct jurors that state had burden of disproving justification; trial court denied request and instructed jurors defendant had burden of proving justification; case was submitted to jurors 6/25/06; court disagreed with *State v. Montes*, 223 Ariz. 337, 223 P.3d 681 (Ct. App. 2009), for which it noted review was pending, reversed conviction, and remanded for new trial).

Article 6, section 1. Judicial power; courts.

az.6.1.010 The Arizona Constitution gives the legislature the power to establish intermediate courts and to determine the scope of their powers.

State v. Putzi, 223 Ariz. 578, 225 P.3d 1154, ¶ 2 (Ct. App. 2010) (when a person is convicted in court of limited jurisdiction and superior court affirms conviction, if person appeals to court of appeals, A.R.S. § 22-375(A) limits jurisdiction to review of facial validity of statute in question).

Article 6, section 9. Intermediate appellate courts.

az.6.9.020 When a person is convicted in a court of limited jurisdiction and the superior court affirms the conviction, if the person appeals to the court of appeals, jurisdiction is limited to a review of the facial validity of the statute in question.

State v. Putzi, 223 Ariz. 578, 225 P.3d 1154, ¶ 2 (Ct. App. 2010) (court upheld constitutionality of Tucson City Code provision that prohibited person from urinating or defecating "in a public place, or in any place exposed to public view").

az.6.9.030 If a party files a notice of appeal while a motion is still pending in the trial court, the appellate court does not have jurisdiction to consider the appeal.

Craig v. Craig, 225 Ariz. 508, 240 P.3d 1270, ¶¶ 2-4 (Ct. App. 2010) (after trial court entered decree of dissolution, husband filed motion for new trial or to amend decree; while those motions were pending, both husband and wife filed notices of appeal; after that, trial court denied motion for new trial in signed order; neither party filed notice of appeal from that ruling or filed amended notice of appeal; court concluded it lacked appellate jurisdiction).

Article 6, section 14. Superior court; original jurisdiction.

az.6.14.020 Subsection (4) grants the superior court subject matter jurisdiction of criminal cases amounting to a felony, and cases of misdemeanor not otherwise provided for by law.

State v. Maldonado, 223 Ariz. 309, 223 P.3d 653, ¶¶ 7-26 (2010) (state did not file information prior to trial, but defendant did not discover that fact until case was pending on appeal; defendant contended that, because state did not file information before trial, trial court did not have jurisdiction; court concluded Article 6, Section 14(4) was constitutional provision that governed subject matter jurisdiction, not Article 2, Section 30; court held that, because defendant did not object prior to trial, defendant would have to establish fundamental error to obtain relief on appeal, and because defendant was not able to establish any prejudice, defendant was not entitled to any relief).

February 25, 2011